United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

Original w/ affidavit of mailing

74-1062, 1816

B P/

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1062, 74-1816

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation,

Plaintiffs-Appellees,

—against—

FRANKLIN NATIONAL BANK,

Defendant-Appellant.

APPEAL FROM MEMORANDUM DECISION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
Attorney for Appellee-Petitioner,
United States of America.

MORTIMER TODEL,
Receiver of the Funds, Assets and Property of Roosevelt Capital Corporation,
Appellee-Petitioner Pro Se.

HENRY A. BRACHTL,
Assistant United States Attorney,
Of Counsel.

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UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation,

Plaintiffs-Appellees,

—against—

FRANKLIN NATIONAL BANK,

Defendant-Appellant.

PETITION FOR REHEARING AND APPENDIX

Preliminary Statement

The United States of America and Mortimer Todel, Receiver of the funds, assets and property of Roosevelt Capital Corporation, appellees, petition for rehearing in the above appeal pursuant to Rule 40, Federal Rules of Appellate Procedure.

In its decision of February 24, 1975, this Court held that "there was no proper basis for jurisdiction in the Eastern District," Slip Opinion, p. 1892, because "the United States is not properly a party," *id.*, p. 1897, its rights as a creditor of Roosevelt Capital Corporation to sue Franklin National Bank having vested in the Receiver of Roosevelt, and the Receiver's claim against Franklin being without the jurisdiction of the Court.

The Court remanded the case to the Eastern District for further proceedings, observing that "appellees Todel and the United States have suggested that this defect can be remedied in the district court," *id.*, p. 1892, and that appellees "ask us only to remand to the district court for possible dismissal there so that the pleadings might be amended to cure the jurisdictional defect," *id.*, p. 1903.

ARGUMENT

A. Remand Is Inappropriate, Unnecessary and Possibly Prejudicial.

Appellees did indeed assert in their November 18, 1974 letter to the Court that the party and attendant jurisdictional defect suggested by the Court during the oral argument could be promptly cured by termination or substitution of the receivership, Appellees' Letter, p. 9, or in other ways, *id.*, p. 6, but did not request a remand of the case to the Eastern District for the purpose, for such a remand is in fact not necessary to permit appellees to repair the defect found by this Court, for reasons stated below.

More importantly, however, simple remand might be fatally prejudicial to the recovery of the Government or the Receiver against appellant, a result we believe was not intended by this Court, for the following reason:

The supersedeas bond furnished by Franklin to secure appellees' judgment during this appeal (copy annexed; A. 1a) is probably the only source from which either the Government or the Receiver may ever collect on their claims against Franklin because, during the pendency of the appeal, Franklin has been declared insolvent and cast into receivership and liquidation. See Slip Opinion, *In the Matter of the Liquidation of Franklin National Bank, a*

National Banking Association, U.S.D.C., E.D.N.Y., Civil Action No. 74 C 1434, Memorandum Opinion per Judd, *J.*, October 8, 1974 (copy annexed; A. 2a).

The concern which prompts this petition is the possibility that the term of Franklin's supersedeas bond could be interpreted to be the pendency of this appeal, and that this appeal could be deemed terminated, and the bond expired, upon a simple remand.

The potentially fatal remand to the district court for further proceedings is neither appropriate nor necessary to permit the Government and Receiver to attempt to cure the party and jurisdictional defects found by this Court because:

(a) A change in the status or identity of the Receiver would be effected, not by the district court in this case, but by the appointing court in the case of the appointment (i.e., *United States* v. *Roosevelt Capital Corporation,* U.S.D.C., S.D.N.Y., 65 Civ. 162); and,

(b) Dismissal and substitution of parties to this case, should such be occasioned by, for example, dismissal or substitution of the Receiver, are not procedures confined to district courts, but are matters expressly within the jurisdiction of this Court, as contemplated by Rules 42 (voluntary dismissal) and 43 (substitution of parties) of the Federal Rules of Appellate Procedure.[1]

---

[1] Hence, not even the device of an expressly limited remand to the district court, with jurisdiction retained in this Court, as in, for example, *United States* v. *Valot,* 473 F.2d 667, 668 (2d Cir. 1973), and *Beck* v. *Federal Land Bank of Houston,* 146 F.2d 623, 624 (8th Cir. 1945), would be necessary in this case.

B. Modification Requested.

The defects found by this Court have not been determined to be incurable, and in fact the decision of this Court clearly contemplates that opportunity to cure the defects will be had. Since consideration of the efficacy of such "cures" is within the ambit of this Court's power under, *inter alia,* Rules 42 and 43, F.R.A.P., and since remand of this action is not only unnecessary but may be fatal to the appellees' collection of funds determined on the merits to be their due, petitioners request that this Court's decision be modified to expressly stay the mandate for a reasonable time—specifically, ninety days—in effect continuing this appeal while permitting appellees to address the defects without risk of loss of the undertaking on appeal.

During the prescribed period, appellees would undertake to cure the defects in the court and case of the Receiver's appointment, and to seek to reflect in this case any resulting changes in the status or identity of the parties in an appropriate motion to this Court, such motion to be heard by the judges who heard the appeal, under Rule 27(b) of the Rules of this Court.

Should the defect be thus cured, then appellees, or their survivor or successor, within the prescribed period, would petition this Court for further rehearing for a determination on the merits. Such subsequent petition for rehearing would, as we understand the practice of this Court, be circulated like this petition among the judges who originally decided this case, without oral argument or additional briefing unless requested by the Court, in accordance with Rule 40, F.R.A.P.

Thus, the modification requested on this petition and the further proceedings it contemplates accord with the need for judicial efficiency as well as the prevention of injustice.

Anticipating such further proceedings and, specifically, a subsequent petition for further rehearing, appellees also request that the decision of this Court be modified to extend appellees' time to so petition for further rehearing for a period corresponding to the stay of the mandate.

C. No Prejudice to Appellant or Surety.

Neither Franklin nor its surety may fairly be said to be prejudiced by the relief prayed for on this petition. The insolvency of the appellant here is the very event contemplated by the undertaking and the very risk borne by the surety. The possible fortuitous avoidance of the consequences of the insolvency by the surety, to the prejudice of the Receiver and the Government (who have already secured a favorable determination on the merits) —and to the public—should not be countenanced, once confronted, by this Court.

Such possible avoidance by the surety and frustration of the appellees' claims would be precluded by the continuation of the appeal in the manner proposed on this petition.

CONCLUSION

WHEREFORE, the Government and the Receiver, petitioners and appellees, pray that this Court reconsider and modify its decision so as to expressly stay for ninety days issuance of this Court's mandate and to extend for a corresponding period appellees' time to petition for further rehearing, and grant such other and further relief as to this Court shall seem just and proper.

Dated: Brooklyn, New York
March 10, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
Attorney for Appellee-Petitioner,
United States of America.

MORTIMER TODEL,
Receiver of the Funds, Assets and Property of Roosevelt Capital Corporation,
Appellee-Petitioner Pro Se.

HENRY A. BRACHTL,
Assistant United States Attorney,
Of Counsel.

APPENDIX

Certified Copy

No. 7307

SEABOARD SURETY COMPANY
NEW YORK, NEW YORK

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That SEABOARD SURETY COMPANY, a corporation of the State of New York, has made, constituted and appointed and by these presents does make, constitute and appoint F. R. Prigge c. Robert R. Kane or A. Eule or Thomas P. Gorke or Thomas F. Johnston or John A. Duffy or John T. XXX Schimpf or Thomas Bean or Stephen J. Serota, of New York, New York----------
its true and lawful Attorney-in-Fact, to make, execute and deliver on its behalf insurance policies, surety bonds, undertakings and other instruments of similar nature as follows: Without Limitations.

Such insurance policies, surety bonds, undertakings and instruments for said purposes, when duly executed by the aforesaid Attorney-in-Fact, shall be binding upon the said Company as fully and to the same extent as if signed by the duly authorized officers of the Company and sealed with its corporate seal; and all the acts of said Attorney-inFact, pursuant to the authority hereby given, are hereby ratified and confirmed.

This appointment is made pursuant to the following By-Laws which were duly adopted by the Board of Directors of the said Company on December 8th, 1927, and are still in full force and effect:

ARTICLE VIII, SECTION 1:

"Policies, bonds, recognizances, stipulations, consents of surety, underwriting undertakings and instruments relating thereto. Insurance policies, bonds, recognizances, stipulations, consents of surety and underwriting undertakings of the Company, and releases, agreements and other writings relating in any way thereto or to any claim or loss thereunder, shall be signed in the name and on behalf of the Company (a) by the Chairman of the Board, the President, a Vice President or a Resident Vice President and by the Secretary, an Assistant Secretary, a Resident Secretary or a Resident Assistant Secretary; or (b) by an Attorney-in-Fact for the Company appointed and authorized by the Chairman of the Board, the President or a Vice President to make such signature; or (c) by such other officers or representatives as the Board may from time to time determine.

The seal of the Company shall if appropriate be affixed thereto by any such officer, Attorney-in-Fact or representative."

IN WITNESS WHEREOF, SEABOARD SURETY COMPANY has caused these presents to be signed by one of its Vice Presidents, and its corporate seal to be hereunto affixed and duly attested by one of its Assistant Secretaries, this .....11th..... day of .....February....., 19....74

Attest:

SEABOARD SURETY COMPANY.

(Seal) .....Karen Hayes.....
Assistant Secretary

By .....W. S. Wehrell.....
Vice-Presid...

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 11th day of February 19 74 before me personally came ..... to me known, who, being by me duly sworn, said that he resides in the State of New Jersey ..... that he is a Vice-President of SEABOARD SURETY COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as Vice President of said Company by like authority.

State of New York, No. 24-7104540
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

(Seal)

.....Violet Johnsen.....
Notary Pub...

CERTIFICATE

I, the undersigned Assistant Secretary of SEABOARD SURETY COMPANY do hereby certify that the original Power of Attorney of which the foregoing is a full, true and correct copy, is in full force and effect on the date of this Certificate and I do further certify that the Vice Pres... who executed the said Power of Attorney was one of the Officers authorized by the Board of Directors to appoint an attorney-in-fact as provided in Article VIII, Section 1, of the By-Laws of SEABOARD SURETY COMPANY.

This Certificate may be signed and sealed by facsimile under and by authority of the following resolution of the Board of Directors of SEABOARD SURETY COMPANY at a meeting duly called and held on the 25th day of March 1970.

"RESOLVED: (2) That the use of a printed facsimile of the corporate seal of the company and of the signature of an Assistant Secretary on any certification of the correctness of a copy of an instrument executed by the President or a Vice-President pursuant to Article VIII, Section 1, of the By-Laws appointing and authorizing an attorney-in-fact to sign in the name and on behalf of the company surety bonds, undertakings undertakings or other instruments described in said Article VIII, Section 1, with like effect as if such seal and such signature had been manually affixed and made, hereby is authorized and approved."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Company to these presents this .....11th..... day of .....October.....; 19.74.....

.....Karen Hayes.....
Karen Hayes
Assistant Secre...

Sec. 5519(a)-2 CPLR

SEABOARD SURETY COMPANY

HOME OFFICE: NEW YORK, N. Y.

BOND NO. 795180

United States District Court
Eastern District of New York

United States of America and
Mortimer Todel, as Receiver of
the funds, assets and property
of Roosevelt Capital Corporation,
Plaintiffs,

-against-

Franklin National Bank,
Defendant

UNDERTAKING ON APPEAL FROM A JUDGMENT DIRECTING THE PAYMENT OF MONEY

Whereas, in the above entitled action on the 10th day of May 19 74 judgment was entered in favor of The United States of America and Mortimer Todel as Receiver of the funds, assets and property of Roosevelt Capital Corporation and against Franklin National Bank

for the sum of ONE HUNDRED FIFTY SEVEN THOUSAND, TWO HUNDRED TWENTY NINE AND 17/100 ($157,229.17) DOLLARS plus interest from

And the Appellant FRANKLIN NATIONAL BANK feeling aggrieved thereby intends to appeal therefrom to the United States Court of Appeals For the Second Circut,

Now, Therefore, the Seaboard Surety Company, a corporation organized under the laws of the State of New York, having its principal office in the Borough of Manhattan, City and State of New York, does hereby, pursuant to the Statute in such case made and provided, undertake ~~in the sum~~ ~~of~~ ~~dollars~~, that if the judgment appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant Franklin National Bank shall pay the amount directed by the judgment to be paid or the part of it as to which the judgment is affirmed together with interest on the judgement.

Dated, October 11th, 1974.

SEABOARD SURETY COMPANY

By

Thomas F. Johnston Attorney-in-Fact

Form 913

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

On the 11th day of October in the year 1974 before me personally came Thomas F. Johnston, to me known, who, being by me duly sworn, did depose and say that he resides in Flushing, N. Y.; that he is the Attorney-in-Fact of the SEABOARD SURETY COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the affiant did further depose and say that the Superintendent of Insurance of the State of New York, has, pursuant to Section 327 of the Insurance Law of the State of New York, issued to Seaboard Surety Company his certificate of qualification, evidencing the qualification of said Company and its sufficiency under any law of the State of New York as surety and guarantor, and the propriety of accepting and approving it as such; and that such certificate has not been revoked.

SAMUEL C. SIMMONS
NOTARY PUBLIC, State of New York
No. 41-9010912
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1976

Samuel C. Simmons
Notary Public

Form 889

SEABOARD SURETY COMPANY

HOME OFFICE: NEW YORK, N.Y.

Financial Statement—June 30, 1974

ASSETS		LIABILITIES	
*Stocks and Bonds	$50,048,791.09	Reserve for Unearned Premiums	$12,907,009.00
Cash in Office & Banks	1,179,775.40	Claim Reserves	5,652,751.00
Accrued Interest & Dividends	400,271.04	Other Reserves	6,900,486.09
Outstanding Premiums	2,191,320.71	Capital Stock	2,500,000.00
Accounts Receivable	1,048,607.92	Surplus	26,908,520.07
Total Admitted Assets	$54,868,766.16	Total Liabilities	$54,868,766.16

* Bonds and Stocks are valued on basis approved by National Association of Insurance Commissioners. Securities carried at $2,603,656.66 in the above statement are deposited for the purposes required by law.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, R. P. SCAGLIONE, President of SEABOARD SURETY COMPANY, do hereby certify that the foregoing is a full, true and correct copy of the Financial Statement of said Company, as of June 30, 1974.

IN WITNESS WHEREOF, I have signed this statement at New York, New York, this .....day of October....., 19..74

SEABOARD SURETY COMPANY 1927 STATE OF NEW YORK

R P Scaglione
President

Form 157

Memorandum Opinion

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74—C—1434

In the Matter of the Liquidation

—of—

FRANKLIN NATIONAL BANK, a National Banking Association.

October 8, 1974

APPEARANCES:

HUGHES, HUBBARD & REED, Esqs.
Attorneys for Petitioner
Federal Deposit Insurance Corporation
as Receiver of Franklin National Bank

By: POWELL PIERPOINT, Esq.
AMALYA L. KEARSE, Esq.
of Counsel

EDWARD BRANSILVER, Esq.
MYERS N. FISHER, Esq.
General Counsel to Federal Deposit
Insurance Corporation

CADWALADER, WICKERSHAM & TAFT, Esqs.
General Counsel to Franklin National Bank
and Franklin New York Corporation

By: PAULA VAN METER, Esq.
of Counsel

JUDD, *J.*:

The court has been asked to give *ex parte* approval to transactions involving billions of dollars and at least two federal agencies and two large banks.

Although the court has determined that such action is proper, approval has not been given without careful consideration during the interval of more than three weeks since the first draft of the basic papers was submitted to the court for consideration.

The matter was first presented to the writer while he was sitting in Miscellaneous Part in September, and has been assigned to him for action now by designation of Acting Chief Judge John F. Dooling, Jr. pursuant to the "Plan for Prompt Disposition of Protracted, Difficult or Widely Publicized Cases" adopted by Order of this Court dated December 22, 1971.

FACTS

The affairs of Franklin National Bank (Franklin) have been the subject of high-level consideration by the Comptroller of the Currency, the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve Bank of New York, among other government agencies, since early May 1974. At that time the announcement of substantial losses in Franklin's foreign exchange department triggered a dramatic decline in its deposits and in its ability to obtain short-term borrowed funds to maintain its liquidity. Advances by the Federal Reserve Bank have enabled Franklin to continue in operation, but these advances had risen from about $135 million on May 10, 1974 to a total of $1.125 billion by May 22, 1974, and now total approximately $1.75 billion.

FDIC and the Comptroller of the Currency have explored various possibilities for improving the financial situation of Franklin, including a proposal from Franklin's new management. The affidavits filed with the petition show that the Comptroller consulted more than two dozen of the largest banks in the United States, and that FDIC also consulted certain major foreign banks concerning various plans to aid Franklin. A plan of liquidation which was thereafter developed by FDIC contemplated sale of some but not all of Franklin's assets after solicitation of bids on the basis of a proposed purchase and assumption agreement.

The Federal Reserve Bank of New York informed the Comptroller of the Currency by letter on October 7, 1974 that

> . . . at the present time, we see virtually no possibility that Franklin can survive for long as an independent institution . . . In all of the circumstances, and with the FDIC plan available, we do not believe that it would be in the public interest for this Bank to continue its program of credit assistance to Franklin.

The plan developed by FDIC and referred to in the letter of the Federal Reserve Bank of New York contemplated that FDIC would be appointed receiver and would sell certain assets, to be selected by the purchasing bank, in an amount equal to Franklin's deposit liabilities at the time of the receivership (about $1.5 billion at August 30, 1974), minus the amount of a premium to be paid by the purchasing bank. The remaining assets would be retained by FDIC, to meet Franklin's outstanding obligation to the Federal Reserve Bank of New York; any surplus after the payment of liquidating expenses will be returned to the stockholders of Franklin. Apart from preferred stockholders, all of Franklin's stock is owned by Franklin New York Corporation.

The FDIC in its corporate capacity has agreed to purchase from the receiver (also FDIC) all assets not purchased by the assuming Bank and to assume the Bank's indebtedness to the Federal Reserve Bank of New York, and repay it out of liquidations and collections to the extent possible, but within three years in any event. Other details set forth in the agreements need not be discussed in this Memorandum Opinion, except to mention that Franklin's trust business might be acquired by a separate institution.

The Comptroller of the Currency on October 8, 1974 at 3:00 p.m. certified that he was satisfied that Franklin "is insolvent, and unable to meet the demands of its depositors and unable to pay its just and legal debts." He thereupon appointed FDIC as receiver of Franklin.

The papers before the court emphasize the need for prompt action, in that the going concern value of Franklin would be lost if its 104 domestic banking offices do not open on the morning of October 9, 1974, and that the purchasing bank would then have the right to withdraw its bid, with the resultant loss of the premium payable to FDIC under the plan.

The Law

The Comptroller of the Currency acted pursuant to 12 U.S.C. § 191 in certifying that Franklin is insolvent, and his appointment of Federal Deposit Insurance Corporation as receiver was required by 12 U.S.C. § 1821(c).

1. The action of the Comptroller in making a finding of insolvency and appointing a receiver has been frequently described as discretionary and not subject to judicial review. *B.V. Emery & Co.* v. *Wilkinson*, 72 F.2d 10 (10th Cir. 1934); *Wannumaker* v. *Edisto National Bank*, 62 F.2d 696 (4th Cir. 1933); *Liberty National Bank* v. *McIntosh*,

16 F.2d 906 (4th Cir. 1927), *cert. dismissed,* 273 U.S. 769, 783, 47 S.Ct. 571; *Munro* v. *Post,* 23 F. Supp. 308 (E.D. N.Y. 1938), *aff'd,* 102 F.2d 686 (2d Cir. 1939). A number of cases have said that the judgment is final unless it appears by convincing proof that the Comptroller's action was arbitrary and made in bad faith. *United States Savings Bank* v. *Morgenthau,* 85 F.2d 811 (D.C. Cir. 1936), *cert. denied,* 299 U.S. 605, 57 S.Ct. 232, *rehearing denied,* 301 U.S. 666, 57 S.Ct. 793 (1937); *Liberty National Bank* v. *McIntosh, supra,* 16 F.2d at 909. *Compare Schram* v. *Schwartz,* 68 F.2d 699, 701 (2d Cir. 1934) (conclusiveness of Comptroller's determination of need for an assessment against stockholders).

The special character of banks, and the delicate problems involved in preserving credit, justify denial of the judicial hearing which would be essential in other situations. *Slay* v. *Berry,* 27 Mich. App. 271, 183 N.W.2d 436, 452-53 (1970), quoting from *Fahey* v. *Mallonee,* 332 U.S. 245, 253, 67 S.Ct. 1552, 1556 (1947).*

Insolvency may result from inability of a bank to meet its obligations as they mature, as distinguished from the theoretical state of its balance sheet. *Smith* v. *Witherow,* 102 F.2d 638 (3d Cir. 1939). *Accord, In re Receivership of Wellsville National Bank, Pa.,* 407 F.2d 223, 226 n.5 (3d Cir.), *cert. denied,* 396 U.S. 832, 90 S.Ct. 85 (1969). Since it is the responsibility of a bank to pay most deposits on demand, the fact that it has assets which ultimately may be worth as much as the deposits does not establish that it could keep its doors open.

The affidavit of the Comptroller contains an analysis of Franklin's financial condition which supports his finding of insolvency on both grounds, that it cannot continue to meet the demands of its depositors and that it has no real equity capital.

---

* An attorney for Franklin was present when the order was signed, but had no formal notice of any hearing.

2. The receiver of a national bank is given authority to sell the assets by 12 U.S.C. § 192, which specifies that

> Such receiver . . . upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; . . . .

It has been held that the approval of a sale under Section 192, and the ratification of its terms, represent a purely administrative act by the court, "the condition precedent to the congressionally granted executive power to sell." *Mitchell* v. *Joseph,* 117 F.2d 253, 255 (7th Cir. 1941). *Accord, Hulse* v. *Argetsinger,* 18 F.2d 944, 945 (2d Cir. 1927); *United States National Bank* v. *Pole,* 2 F. Supp. 153 (D. Ore. 1932); *Fifer* v. *Williams,* 5 F.2d 286 (9th Cir. 1925); and *Dugger* v. *Cox,* 110 F.2d 834, 836 (6th Cir. 1938), where the court stated,

> The proceeding in Court for the approval of a sale is ex parte.
>
> The statute does not contemplate notice of those interested and there are none of the essentials of a controversy, the proceedings lacking judicial characteristics.

The functions of the court were recently canvassed by Judge Palmieri in *In re Home National Bank of Ellenville, N.Y.,* 147 F. Supp. 389 (S.D.N.Y. 1956), a case in which the writer had a part. Although questioning the grant of administrative powers to a federal judge, he held that a century of judicial and congressional authority was binding, and he approved the sale of assets submitted in that case.

Here the papers make a *prima facie* showing that the proposed sale of assets and the related agreements are

not arbitrary, but are the best solution to a serious and delicate problem. It appears that FDIC has carefully canvassed the market, has determined that the proposed sale of a substantial portion of the assets is the most desirable method of resolving the Bank's problems, and has invited bids from at least four qualified banks.

The proposed agreements will protect the depositors of the Bank against loss. The Federal Reserve Bank of New York, which has granted massive assistance to Franklin for several months, is also protected against loss. The rights of creditors remain against the receiver and the assuming Bank, and do not create any obstacle to the approval of the agreement.

The reserve fund of the FDIC will bear substantial risk, but this seems to be authorized as a means of orderly liquidation. 12 U.S.C. § 1823(e).

The rights of the stockholders of the Bank and its holding company are of course affected. In a practical sense they may derive some protection from the substantial premium over the book value of assets which the purchasing Bank has agreed to pay to FDIC, and which will be part of the assets computed in determining whether there is any surplus for stockholders after the liquidation is completed. This may not, however, deter stockholders from feeling that they are hurt. However, under the cases cited above, the stockholders have no right to challenge either the determination of insolvency or the sale of assets. Any other rights that survive need not be determined at this time.

Any meaningful notiec and hearing would defeat the expedition which is necessary in order to preserve the basic values of an insolvent bank. Both precedent and practicality therefore support the petition for *ex parte* approval.

The Order submitted by FDIC has been signed this day.

ORRIN G. JUDD

/s/ .....

U.S.D.J.

★ U. S. Government Printing Office 1975— 614—248—84

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of March 1975 he served a copy of the within Petition for Rehearing and Appendix

by placing the same in a properly postpaid franked envelope addressed to:

Kaye, Scholer, Fierman, Hays & Handler, Esqs.
425 Park Avenue
New York, N. Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
10th day of March 19 75

Martha Schaap

Notary Public, State of New York
Commission Expires March 30, 1975